United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7161

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-7161

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FLM COLLISION PARTS, INC.,

Plaintiff-Appellee,

—against—

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(D.C. 73 Civ. 713 (T.P.G.))

BRIEF OF DEFENDANTS-APPELLANTS

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Preliminary Statement

Ford Motor Company ("Ford") and Ford Marketing Corporation[1] appeal from a judgment in favor of plaintiff FLM Collision Parts, Inc. ("FLM") for $874,506 in treble damages and $135,000 in attorneys' fees entered by the District Court for the Southern District of New York (Hon. Thomas P. Griesa) after trial by the Court without a jury in this Robinson-Patman Act price discrimination action.

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1. At the close of business on December 31, 1974, Ford Marketing Corporation ceased doing business and was merged into Ford Motor Company. For purposes of this appeal Ford Motor Company and Ford Marketing Corporation are referred to collectively as "Ford," which accords with the designation of defendants by the District Court.

While Ford appeals on several grounds, including the District Court's award of damages in this action, the central focus of this brief is the Court's finding of liability under the Robinson-Patman Act. Ford submits that this threshold finding of liability suffers from such fundamental error as to require reversal as a matter of law.

Stated more fully, Ford asserts two grounds for error on this issue:

First, the Court held that Ford was guilty of a price discrimination in its sales of "crash parts" to Ford franchised dealers, despite the undisputed fact that each and every one of Ford's crash parts customers received identical price treatment; the same incentive allowance was offered by Ford to all Ford dealers reselling the parts to independent repair shops or other persons engaged in automotive service or repair work, and no such allowance was offered to any dealer not reselling to such repair outlets.

Second, the Court contravened well-settled standing to sue doctrine in this Circuit when it permitted a private antitrust claim to be asserted by a customer of the allegedly disfavored purchaser—a plaintiff whose alleged injury is derivative, indirect and incidental.

As we shall demonstate below, these and other plain errors require that the District Court's judgment be reversed.

The Issues Presented for Review

1. Where Ford accorded each and every one of its dealers identical price treatment by offering all of them an incentive allowance on crash parts resold to independent repair shops and other persons engaged in automotive

service or repair work, while offering the allowance to none of its dealers on resales to any other kind of customer, was it error for the District Court to hold that Ford had discriminated in the price it charged its dealers?

2. Was it error for the District Court to hold that FLM had standing to assert a private antitrust claim for damages resulting from an alleged discrimination against its *suppliers*—Ford dealers who, unlike FLM, were purchasers of crash parts from Ford?

If either of the foregoing issues is determined in the affirmative, that determination will be dispositive of this appeal and the Court need reach no other issue. If the Court should determine these issues in the negative, however, the following additional issues are presented:

3 Was it error for the District Court to hold that FLM was entitled to recover "automatic" damages in the amount of the entire alleged price discrimination against FLM's suppliers, in light of this Court's square rejection of such awards in *Enterprise Indus., Inc.* v. *Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957)?

4. Was it error for the District Court, over and above its award of "automatic" damages, to award FLM additional damages on a "lost sales" theory when the evidence did not establish the quantum of diverted sales, if any, resulting from the alleged discrimination?[2]

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[2] Ford urges, in addition, that the District Court erred in awarding $135,000 in attorneys' fees despite the acknowledged failure of FLM's trial counsel to maintain *any* records of time spent prosecuting this action. Such an award is directly contrary to this Court's express requirement that time records be maintained by counsel seeking fee awards. *In re Borgenicht*, 470 F.2d 283, 284 (2d Cir. 1972); *In re Hudson & Manhattan Railroad Co.*, 339 F.2d 114, 115 (2d Cir. 1964).

(footnote continued on following page)

Statement of the Case

A. The Nature of the Case

FLM commenced this action on February 15, 1973, challenging Ford's system for the distribution of "crash parts"[3] for Ford motor vehicles. The complaint, which sought treble damages and injunctive relief, alleged, *inter alia*, that Ford's distribution system violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,[4] and Sections 1 and 2 of the Sherman Act.[5]

The trial commenced before Hon. Thomas P. Griesa sitting without a jury on September 23, 1974. On December 19, 1975, the District Court rendered its opinion on the liability phase of the case[6] finding (1) that Ford had discriminated in price in violation of the Robinson-Patman Act; (2) that FLM (although neither a direct nor an indirect purchaser from Ford) had standing to recover dam-

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(footnote continued from preceding page)

Moreover, the District Court arrived at its award of $135,000 for attorneys' fees by inflating its initial award, based on an estimate of time spent multiplied by an hourly rate for counsel, by over 55% without giving an adequate explanation for such an increase. Such an unexplained inflated award also contravenes established precedent of this Court. *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974).

3. "Crash parts" are defined at p. 6, *infra*.

4. 15 U.S.C. § 13(a) ("Section 2(a) of the Robinson-Patman Act").

5. 15 U.S.C. §§ 1, 2. The complaint also alleged violations of Sections 3 and 7 of the Clayton Act (15 U.S.C. §§ 14 and 18), but these claims were never prosecuted.

6. The District Court's Slip Opinion on liability appears at pages 1574a-1642a of the Joint Appendix; it is officially reported at 406 F. Supp. 224. References to pages of the Joint Appendix and the Exhibit Volumes thereto are indicated by "a" and "e" respectively. References to paragraphs of the Stipulated Facts are preceded by the abbreviation "Stip."

ages resulting from such "discrimination"; and (3) that FLM had failed to establish any violation of the Sherman Act. Since the record was inadequate as to FLM's damages, the Court reserved that question and the scope of injunctive relief for later proceedings.

Further hearings on the damages issue were held on February 9 and March 2, 1976. On March 17, 1976, the Court rendered a Supplemental Opinion[7] and entered judgment for $874,506 in treble damages and $135,000 in attorneys' fees as well as an injunction.[8] Ford filed its notice of appeal on March 19, 1976, together with a motion for a stay of the injunction pending appeal and other ancillary relief. This Court denied that motion on April 27, 1976 but ordered that this appeal be heard on an expedited basis.

B. The Facts

The facts relevant to this appeal are simple. Ford sells "crash parts" only to its franchised dealers on uniform prices and terms. More particularly, Ford grants to all dealers a wholesale incentive allowance ("incentive allowance") of 25% on certain parts[9] which the dealers resell to independent body repair shops and other customers engaged in automotive service or repair work. The plaintiff, FLM, purchases such parts from Ford dealers and

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7. The Court's Supplemental Opinion appears at pp. 2022a-43a of the Joint Appendix. References to pages of that opinion are preceded by the abbreviation "Supp. Opinion."

8. An amended judgment correcting a clerical error was entered on March 24, 1976. (2151a)

9. Not all of Ford's automotive replacement parts are eligible for the incentive allowance. For example, certain replacement parts for compact and sub-compact automobiles are not eligible and therefore are not "incentive-bearing" parts. (877a-78a)

resells them to independent repair shops. Since FLM is not engaged in automotive service or repair work, its Ford dealer-suppliers do not receive the incentive allowance from Ford on their resales to FLM. FLM complains that this limitation on the scope of the incentive allowance constitutes a price discrimination by Ford vis-a-vis its dealers which injures FLM in *its* competition with Ford dealers for the business of independent repair shops.

1. Ford's Crash Parts Business—Crash parts are sheet metal parts such as fenders, grills and hoods which are custom designed and manufactured to fit particular years and models of vehicles. (Stip. 5) Ford also stocks a full line of other automotive replacement parts, such as spark plugs, filters and batteries. Of the approximately 240,000 different automotive replacement parts stocked by Ford, less than 5% (approximately 10,100) are crash parts. (Stip. 11; 919a)

Ford crash parts are manufactured only by or for Ford, using dies owned by Ford. (Stip. 4) Ford sells crash parts for privately-owned domestic Ford, Lincoln and Mercury vehicles *exclusively* to franchised dealers. (Stip. 10) The 6,800 Ford[10] dealers in the United States (Stip. 14) in turn either use the parts in their own body shop repair operations (*i.e.*, resell them to vehicle owners) or resell them to others—principally to independent repair shops which compete with Ford dealers for the vehicle owners' repair business.

2. Prices and Terms of Sale of Ford Crash Parts—Ford sells crash parts to Ford dealers throughout the United

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10. References to "Ford" dealers include Lincoln-Mercury dealers as well.

States on uniform terms and at uniform prices which are published in Ford's Master Price Lists. (Stip. 14; 764a) The pricing system utilized by Ford and reflected in the Master Price Lists is based upon the so-called "dealer net" price (Stip. 15), which is generally 40% of the suggested retail price of the particular part.

Starting from the "dealer net" price, franchised dealers are eligible to receive certain discounts, allowances and credits from Ford on their crash part purchases. Among these is the incentive allowance with which this case is concerned. (Stip. 16) That allowance—which applies to many different automotive replacement parts (including crash parts)—is available, in essence, only on resales to customers engaged in automotive service and repair work. (Stip. 23)

3. The Incentive Allowance

(a) The origin of the incentive allowance on Ford's sales of crash parts to franchised dealers—The incentive allowance—which has been granted on certain types of replacement parts (*e.g.*, spark plugs, filters and batteries) since the 1950's—was first made available on sales of crash parts in 1968 at the behest of the Federal Trade Commission ("FTC"). (DX CS-CV, 355e-60e; 878a) The incentive allowance, it was hoped, would be implemented through Ford's existing distribution system to encourage franchised dealers to sell crash parts to independent repair shops at prices close to "dealer net," the price paid by the dealers themselves, rather than at a markup over "dealer net" which, in the absence of an allowance, would have to be borne by independent repair shops. (*Id.*)

Although the purpose of the incentive allowance with respect to incentive-bearing parts in general was clear

—to encourage resales by franchised dealers to retailers at prices comparable to "dealer net"—the eligibility requirements for the incentive allowance as originally formulated failed to effectuate that purpose. Until those requirements were clarified in 1971, franchised dealers were entitled to receive the allowance for any resale of incentive-bearing parts to almost any kind of customer, the only exceptions being resales to another franchised dealer or to a vehicle owner. (Stip. 19)

(b) Clarification of the incentive allowance policy—As early as 1969, Ford became aware that the incentive allowance policy as it applied to incentive-bearing parts—not specifically crash parts—needed clarification. By mid-1969 it had become apparent to responsible Ford personnel that the incentive allowance was not serving its intended purpose and was at the same time becoming increasingly more costly. (PX 9, 1e; 791a-92a) In an effort to remedy these problems, Ford initiated a detailed study of the incentive system as it applied to all automotive replacement parts. (795a-96a)

The study revealed that the eligibility requirements were too easily subject to abuse. Audits conducted as part of this study discovered a number of dealers who were claiming the incentive allowance on resales of parts (other than crash parts) to ineligible[11] customers such as other franchised dealers. (795a-96a, 852a-53a) In particular, these audits uncovered situations where dealers were selling incentive-bearing parts (such as spark plugs) to independent wholesalers who in turn were reselling the same parts to

11. It should be noted that the term "ineligible" does not mean that such a customer cannot purchase parts, but only that the sale of parts to such a customer does not entitle the selling dealer to an incentive allowance.

other dealers, thereby acting as intermediaries between one franchised dealer and another. (*See* PX 115, 134e; PX 116, 138e; PX 117, 142e)

Such resales to intermediaries were not intended to be eligible for the incentive allowance since these entities did nothing to further the distribution of parts to retailers, but only served as conduits between dealers—enabling dealers to claim the incentive allowance on resales to other dealers by means of "paper" transactions with the intermediaries. (*See e.g.*, PX 114, 131e) At the time the incentive allowance was extended to crash parts, Ford assured the FTC that:

> "The term 'eligible customer' will include independent garages and bump shops; *it will not include insurance companies, brokers or other parties acting as intermediaries* selling Ford or Lincoln-Mercury parts to Ford Motor Company dealers." (DX CS, 356e) (emphasis added)

Nevertheless, the audits left no doubt that the definition of "eligible customers," as originally formulated, enabled dealers to receive the incentive allowance on resales of incentive-bearing parts (such as spark plugs) to intermediaries. Moreover, Ford recognized that the potentially adverse effects flowing from this unintended definitional "loophole" were at least threefold with respect to resales of incentive-bearing parts in general:

First, the loophole could frustrate the objectives of the incentive allowance. As noted above, the purpose of the incentive was to encourage dealers to resell parts to retailers at approximately "dealer net," the idea being that if a retailer were able to purchase parts from a dealer at "dealer net" he would be paying the same price as a dealer purchasing directly from Ford who retailed such parts him-

self. It was evident that this purpose could be undermined were a dealer able to purchase parts for retail resale at prices substantially below "dealer net." Yet the audits indicated that this had occurred in cases where dealers purchased incentive-bearing parts from other dealers through intermediaries, since the first dealer selling to the intermediary was able to receive the incentive allowance which in turn could be passed on to the second dealer via the intermediary. (*See, e.g.*, PX 117, 142e)

Second, the "loophole" could undermine Ford's policy of endeavoring to see to it that its dealers ended up on a price parity. A dealer purchasing crash parts directly from Ford for use in his own retail operations would pay "dealer net," while a dealer purchasing from another dealer through an intermediary could pay substantially less for the same part. Although such transactions would not provide a basis for a claim of price discrimination under the antitrust laws since all purchasers from Ford paid the same price, it was clear to Ford that continuing to grant the incentive allowance on resales to intermediaries could upset its policy of affording dealers equal price treatment. (796a)

Finally, the "loophole" could enable two or more dealers to defraud Ford by each claiming the incentive allowance on the same part. Under the terms of the allowance, a dealer selling to an intermediary was entitled to the incentive allowance; likewise, resales to retailers entitled a dealer to receive the allowance. Thus the second dealer purchasing through an intermediary was able to resell the part to a retailer and claim a second incentive allowance from Ford on the same part. (827a-33a, 1085a; PX 116, 274e)

Having reviewed these problems, Ford concluded that the "loophole" needed to be closed with respect to *all* incentive-

bearing parts. Accordingly in 1971, Ford clarified the scope of the incentive allowance as it applied to *all parts* (including crash parts) by expressly providing that the incentive allowance would be offered to dealers only on resales to retailers (*i.e.*, resales to customers engaged in automotive service and repair work). (DX AH, 275e)

4. **Sales of Crash Parts by Franchised Dealers**—The incentive allowance granted to dealers on resales of incentive-bearing crash parts is credited or paid directly to the dealers to whom Ford sells such parts. (Stip. 21) The dealers individually decide the prices at which and the terms on which they resell crash parts to their customers. (PX 9, 1e) Ford does not control that decision. Dealers may or may not elect to reflect, in whole or in part, in their prices and terms of sale to any particular customer any discount, allowance or credit which they receive from Ford with respect to their purchases of crash parts. Whether a dealer reflects in its prices or terms of sale any portion of the discount, allowance or credit received by it from Ford does not in any way affect its receipt by the dealer. (DX G, 154e; 361a-62a)

5. **FLM's Business in Crash Parts**—Since its incorporation in April 1965, FLM has conducted a local business primarily in the Bronx and southern Westchester County in which it purchased Ford, Lincoln and Mercury crash parts from Ford dealers and resold such parts to independent body shops, garages and service stations in that area. (Stip. 2; 1008a) There is no evidence that FLM has ever performed a recognized role in Ford's crash parts distribution system, but only that it functioned as an added level of distribution between franchised dealers and retailer customers.

FLM has from time to time purchased crash parts from four Ford. Central Lincoln-Mercury Corp. ("Central") of Brooklyn (dealership sold to Atlas Lincoln-Mercury, Inc. ("Atlas") in July 1972); Thomas Motors, Inc. ("Thomas") of Yonkers; Parkview Lincoln-Mercury, Inc. ("Parkview") of Yonkers; and Pleasantville Ford, Inc. ("Pleasantville") of Pleasantville. (Stip. 22) It has never purchased crash parts from Ford. (*Id.*)

The prices FLM pays various Ford dealers for the parts it purchases, the terms on which it buys the parts, and the choice of dealers with which it does business are all matters of negotiation between FLM and the dealers, and Ford has neither played nor sought to play any role in such matters. (PX 9, 1e; 821a-22a)

From November 1, 1968 until July 1, 1971 dealers selling crash parts to FLM were able under the language of the eligibility requirements to claim incentive allowance credits from Ford on such sales. On July 1, 1971, the definition of "ineligible sales" was amended for the reasons stated above to specify as ineligible: "Sales to any customers NOT engaged in automotive service or repair work . . ." (DX AH, 275e) FLM does not dispute that it falls within this ineligible category.

Despite this clarification in the statement of "ineligible sales," both Central and, later, Atlas continued to claim incentive allowance credits for sales to FLM until November 1, 1972, some 16 months after the policy had been changed. (Stip. 24)

An oversight on the part of the responsible Ford employees led it to continue to pay the incentive allowance claimed by Central and Atlas with respect to such resales until November 1, 1972. When this error was discovered, the payment of such incentive allowance was promptly

terminated, and since that date, no dealer has received incentive allowance credits from Ford for resales to FLM. (Stip. 26)

C. The District Court's Decisions

1. FLM's Price Discrimination Claim—In adjudicating FLM's Robinson-Patman claim, the District Court squarely rejected FLM's contention that, under the so-called "indirect purchaser" doctrine, it should be considered as if it were a Ford customer. Noting that this doctrine covers "situations where a defendant has *de facto* control over the purchase price paid for goods by parties more than one step removed from the defendant in the line of distribution,"[12] Judge Griesa found as a fact that "Ford has never sought to suggest or influence in any way the markup charged by a Ford dealer to FLM,"[13] and correctly held that the doctrine was therefore inapplicable.[14]

Nevertheless, the Court found that Ford had discriminated in price because it "charge[d] different prices to different purchasers—Ford dealers—for the same crash parts." (Slip Opinion, 1605a) This conclusion was reached despite

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12. Slip Opinion, 1619a. The Court cited as authority for this settled proposition *American News Co.* v. *FTC*, 300 F.2d 104 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962); *Purolator Products, Inc.*, 65 F.T.C. 8, 32 (1964), *aff'd*, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968); *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937).

13. Slip Opinion, 1620a.

14. The Court also rejected FLM's contention that *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968), should be extended to cover this case. Pointing out that *Fred Meyer* "was intended to equalize the position of the parties found by the Court to be customers," Judge Griesa properly distinguished the case on the ground that "FLM is not seeking to obtain, nor could it properly be permitted to obtain, equalization of its prices with the prices paid by the Ford dealers." Slip Opinion, 1621a.

the uncontroverted fact (Stip. 23) that every Ford dealer was afforded identical treatment and the same opportunity to receive an incentive allowance on resales to independent repair shops, and that no dealer obtained such an allowance on other types of resales, including resales to FLM. Judge Griesa's reasoning was that the price differential between purchasers of parts resold to repair shops and purchasers of parts resold to other types of customers, including FLM, constituted a discrimination within the meaning of Section 2(a). Inferring the statutory requisite of probable injury to competition from the simple presence of the "discrimination," and rejecting Ford's assertion that the lower price reflected a lawful functional discount, the Court concluded that Section 2(a) had been violated.

2. **FLM's Standing To Sue**—For the first time in the history of the Robinson-Patman Act, and contrary to this Court's oft-repeated denial of standing to persons whose claimed injury is indirect, incidental and derivative, the District Court held that an entity which did not buy from an allegedly discriminating seller but rather from the purportedly disfavored customer of that seller had standing to assert a treble damage claim against that seller for a violation of Section 2(a).

3. **FLM's Damages**—Despite this Court's ruling in *Enterprise Indus., Inc.* v. *Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), the District Court awarded "automatic" damages of $246,766 (untrebled)—the full amount of the allowances which Ford, at the behest of the Federal Trade Commission, gave its dealers on sales to independent repair shops and which its dealers would have received on their sales to FLM had FLM been a repair shop. What is more, the Court awarded additional damages of $44,736 (untrebled) to "compensate" FLM for

purportedly lost profit on sales it allegedly would have made had the incentive allowance been available to its suppliers, even though there was no evidence of actual lost sales. In addition, the Court entered a mandatory injunction ordering Ford to extend the incentive allowance to dealers reselling crash parts to FLM and to inform its dealers in the New York area of that fact by letter.[15]

4. FLM's Sherman Act Claims—Each of FLM's claims under the Sherman Act was rejected. First, the Court found that the doctrine of *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)—which prohibits territorial and customer restrictions on goods after the passage of title—had no application because there was no evidence of any agreement between Ford and any dealer not to sell crash parts to FLM (Slip Opinion, 1634a-35a); on the contrary, FLM was receiving all the parts it desired. Second, the Court found that FLM had failed to establish any vertical conspiracy among Ford and its dealers to fix the dealers' prices to FLM (*Id.*); indeed, the record demonstrated that FLM paid low prices to its dealer-suppliers, who took narrow margins on these sales. (Slip Opinion, 1580a, 1587a, 1600a) The Court likewise disposed of FLM's claim of a combination between Ford and its wholly-owned subsidiary, Ford Marketing Corporation, as unsupported by the evidence. (Slip Opinion, 1634a-35a)

FLM's claim that Ford's refusal to sell directly to it violated the Sherman Act—a contention which the Court noted was not advanced "forcefully"—was likewise dismissed since, under "well-established law, Ford had the

15. The latter requirement was modified by the Court to require that such a letter be sent to only two specified dealers with whom FLM contemplated dealing. (2144a) Ford sent those letters on April 1, 1976.

right to distribute automobiles and crash parts manufactured by it solely to franchised dealers." (Slip Opinion, 1637a-38a) As for FLM's claim of monopolization, the Court (without even reaching the issue of whether Ford possessed monopoly power in any relevant market) ruled that the prohibition of Sherman Act, Section 2 against the use of monopoly power on one level of distribution to destroy competition on another level had no applicability here since Ford did not compete with FLM in sales of crash parts to independent repair shops. (Slip Opinion, 1636a-37a)

ARGUMENT

I.

The District Court Erred in Concluding that Ford Had Violated Section 2(a) of the Robinson-Patman Act; Moreover, the Court Erred in Ruling that FLM —A Non-Purchaser From Ford— Had Standing to Sue.

A. Since Ford Did Not Discriminate in Price Between Its Purchasers, There Could Be No Violation of Section 2(a).

The District Court's ruling that Ford violated the Robinson-Patman Act by providing an incentive allowance to dealers only when they resold crash parts to independent repair shops and not on resales to anyone else is grounded on an erroneous premise—that there was in fact a price discrimination within the meaning of the statute. As demonstrated below, there was no such discrimination because all of Ford's crash parts customers received equal treatment; therefore, the *sine qua non* of any action under Section 2(a) is lacking, and the judgment below must be reversed.

1. There Was No Price Discrimination; Each Purchaser of Crash Parts from Ford Was Treated Precisely the Same.

Section 2(a) of the Robinson-Patman Act provides, in relevant part:

> "That it shall be unlawful for any person . . . *to discriminate in price between different purchasers* of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to . . . injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them." (Emphasis added).

The statutory language could not be clearer; Section 2(a), by its terms, applies only when the defendant discriminates in price between different purchasers. It is indisputable that FLM was *not* a purchaser from Ford, either direct or, as the District Court found on the facts, indirect. Thus, as Judge Griesa readily acknowledged, the only conceivable "price discrimination" present here is the difference between the price a dealer pays for crash parts when he resells them to an independent repair shop and the higher price a dealer pays when he disposes of the parts in any other manner—including by resale to FLM. The District Court's analysis is thus grounded on its assumption that the difference in the price paid by a dealer reselling to FLM and that paid by a dealer reselling to an independent repair shop amounts to a price discrimination. The Court's *entire* discussion of this threshold issue of law appears in the following two sentences:

> "Putting aside for the moment the question of the purpose of Ford's price differentials, it would appear

> at least that the basic elements of a Section 2(a) violation are made out. Ford charges different prices to different purchasers—Ford dealers— for the same crash parts." (Slip Opinion, 1604a-05a)

However, the plain fact is that there was no discrimination because equality of treatment is the very antithesis of discrimination;[16] and every Ford dealer was treated precisely alike in the pricing of crash parts it purchased from Ford. In other words, every dealer who resold to an independent repair shop was offered the incentive allowance for having done so, and no dealer was offered it when he disposed of the product in any other manner—either by using it in his own repair business (*i.e.,* reselling it to a vehicle owner) or by reselling it to other dealers, to middlemen like FLM, or to anyone else. For this reason, no dealer electing to do business with FLM was disadvantaged in his competition for that business with any other dealer. Every dealer reselling to FLM paid the same price; and the same was true with respect to every dealer reselling to independent repair shops. Thus, there was no favored dealer, no disfavored dealer, no price discrimination and, hence, no possible violation of the Robinson-Patman Act.

The District Court's fundamental error was in assuming that every price differential is, *ipso facto*, a price discrimination. That is demonstrably not so. If every purchaser from a supplier has the same opportunity to avail himself of a lower price offer, there is no discrimination

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16. As Judge Learned Hand stated in a different context in *Sun Cosmetic Shoppe, Inc.* v. *Elizabeth Arden Sales Corp.*, 178 F.2d 150, 152 (2d Cir. 1949), "the Act does not undertake to forbid a seller to grant favors to his customers, any more than it undertakes to compel him to grant them; it only insists that the distribution, if any, shall be equal."

even if some purchasers do not in fact take advantage of that opportunity and accordingly pay a higher price.

Illustrations of such "functional availability" are not hard to find in the business world. For example, it is a common practice for merchants to encourage prompt payments by offering their customers a "cash" discount if payment is made within a specified period of time. By the same token, discounts are often provided for purchases in certain minimum quantities low enough for even the smallest customer to take advantage of the discount. The same is often true for some rebates premised on sales volume designed to increase sales effort.

No one has ever suggested that these every-day practices violate the law—and for good reason. When a discount is functionally available to all purchasers, customers who do not elect to avail themselves of it cannot be heard to complain that they are victims of a price discrimination.

It is true that in *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960), the Supreme Court stated that "a price discrimination . . . is merely a price difference." But that statement, made in the context of a "primary line" case involving territorial price discrimination, has no application here. [17] Here there is availability on like terms to all purchasers; there it was the unavailability of like terms which made a difference in price a discrimination. As the

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17. The Court in *Anheuser-Busch* took pains to stress that its equation of a price differential with a price discrimination was intended to apply only in the context of a claim of "primary-line competition" (*i.e.*, competition with the alleged discriminating seller). 363 U.S., at 542. Indeed, the claim in *Anheuser-Busch* was premised on territorial price discrimination (*i.e.*, the prices in one area were lower than in another). The decision, therefore, has no application to a situation where, as here, discounts are uniformly available on the same terms to all purchasers wherever located.

leading authority on the Robinson-Patman Act has noted:

> "Notwithstanding the broad *Anheuser-Busch* doctrine as to differentials in prices paid, *no price discrimination arises if the same concessions are practically available to all customers,* even though some do not avail themselves of the option." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 97 (1962) (emphasis added). [18]

Indeed, following its decision in *Anheuser-Busch* the Supreme Court itself made it clear that not every price difference constitutes a price discrimination.

In *FTC* v. *Borden Co.*, 383 U.S. 637 (1966), the issue was the legality under Section 2(a) of differences in the price of evaporated milk sold by the respondent under the "Borden" label and under private labels. After holding that milk sold under both labels met the statutory test of "like grade and quality" because it was physically and chemically identical, the Court remanded for a determination, *inter alia*, of "whether the differential under attack is discriminatory within the meaning of the Act. . . ." *Id.*, at 646.[19] If every price difference were automatically a price discrimination, the Court would not have stated that the issue was open on remand, since there was no dispute

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[18] Rowe proceeds to cite as examples: cash discounts, quantity discounts and freight concessions which, when realistically available to all customers, are not discriminatory. *Id.*, at 98.

[19] During the course of oral argument, counsel for the FTC was asked by Justice White (who ultimately wrote the opinion of the Court) whether he would "be here if Borden had put both brands up to everyone." The response was a flat "No, sir." *Antitrust & Trade Reg. Rep.*, No. 237, at p. A-2 (January 25, 1966).

that Borden's price for the private label milk was lower than the price for the "Borden" labeled product.[20]

Justice Stewart, who dissented on the "like grade and quality" issue, made the point explicitly:

> "It is not clear that the 'injury to competition' and 'cost justification' issues will be reached on the remand. As the opinion of the Court suggests, *ante*, p. 646, the existence of price discrimination is an issue that remains open in the Court of Appeals. If *Borden is able to demonstrate that the price differential between its premium and private label brand is not a price discrimination, the inquiry by the Commission is at an end*, and no issue of injury to competition or cost justification under § 2(a) is reached. Nothing in *FTC* v. *Anheuser-Busch*, 363 U.S. 536, a case concerned only with territorial price discrimination, requires an equation in all circumstances between a price differential and price discrimination. So long as Borden makes private label brands available to all customers of its premium milk, it is unlikely that price discrimination within the meaning of § 2(a) can be made out." 383 U.S., at 659 n. 17 (emphasis added).

Even before *Borden*, the Supreme Court had implicitly recognized that there is no discrimination when the lower price is functionally available to all purchasers. Thus, in con-

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20. "This [private brand] milk . . . is sold at both the wholesale and retail level at prices regularly below those obtained for the Borden brand milk." 383 U.S. at 638. The Court's opinion, at an earlier point, also makes it plain that the discrimination issue was an open one despite the admitted price difference. "But if the transactions are deemed to involve goods of disparate grade or quality, the section has no application at all and the Commission never reaches either the issue of discrimination or that of anticompetitive impact." *Id.* at 643.

demning the quantity discounts granted by the respondent in *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 42 (1948), the Court pointed out: "Theoretically, these discounts are equally available to all, but functionally they are not." Indeed, the functional availability concept had been applied as early as 1934 under the original Section 2 of the Clayton Act. In *Boss Mfg. Co.* v. *Payne Glove Co.*, 71 F.2d 768, 770 (8th Cir.), *cert. denied,* 293 U.S. 590 (1934), the Eighth Circuit held that there was no discrimination when "equal opportunity was given to all prospective purchasers" to buy both the cheaper and more expensive lines of the defendant's products.[21] *See also, William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 389 F. Supp. 1334, 1341 (N.D. Calif. 1975) (differential between branded and private label goods, if offered to all customers, would not be discriminatory); *Tosa Chrysler-Plymouth, Inc.* v. *Chrysler-Motors Corp.*, 1974-1 CCH Trade Cas. ¶ 75,006 (E.D. Wis. 1974) (rebates premised on sales volume not necessarily discriminatory); *Chapman* v. *Rudd Paint & Varnish Co.*, 409 F.2d 635, 644 (9th Cir. 1969) (universally available discounts for advance deposits not discriminatory); *Cannon Mills, Inc.*, FTC Docket 7494, p. 47 (initial decision Dec. 3, 1963), *aff'd without opinion*, 65 F.T.C. 408 (1964) (quantity discount not discriminatory).

These authorities establish what common sense plainly dictates: There can be no price discrimination if every purchaser is treated the same; and that is precisely the situation here. Every Ford dealer was offered the identical price arrangement on crash parts purchased from Ford. Each paid the "dealer net" price on all parts except those

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21. The Robinson-Patman Act did not amend the statute in any way relevant to this conclusion. Indeed, Justice Stewart cited *Boss* in his *Borden* opinion. 383 U.S., at 659 n.17.

resold to independent repair shops, on which the incentive allowance (in an identical amount to every dealer) was paid. No dealer received a "better deal" from Ford than any other dealer; thus, no dealer was favored, and none was discriminated against.

The only "discrimination" found by the District Court was the differential between the price paid by a dealer when he resold to independent repair shops and that paid by a dealer when he resold to FLM. Since the fact is indisputable that each and every dealer was treated alike because the incentive allowance was functionally available to all who chose to qualify for it, there was no discrimination within the meaning of Section 2(a). There being no possible violation of the statute in the absence of a price discrimination between purchasers from the same seller, that is the end of the inquiry, and the judgment below must be reversed.

2. In the absence of a price discrimination, the issue of injury to competition is not reached. In any event, the District Court's analysis of that issue is demonstrably fallacious since its "logic" would preclude charging a wholesaler a lower price than a retailer.

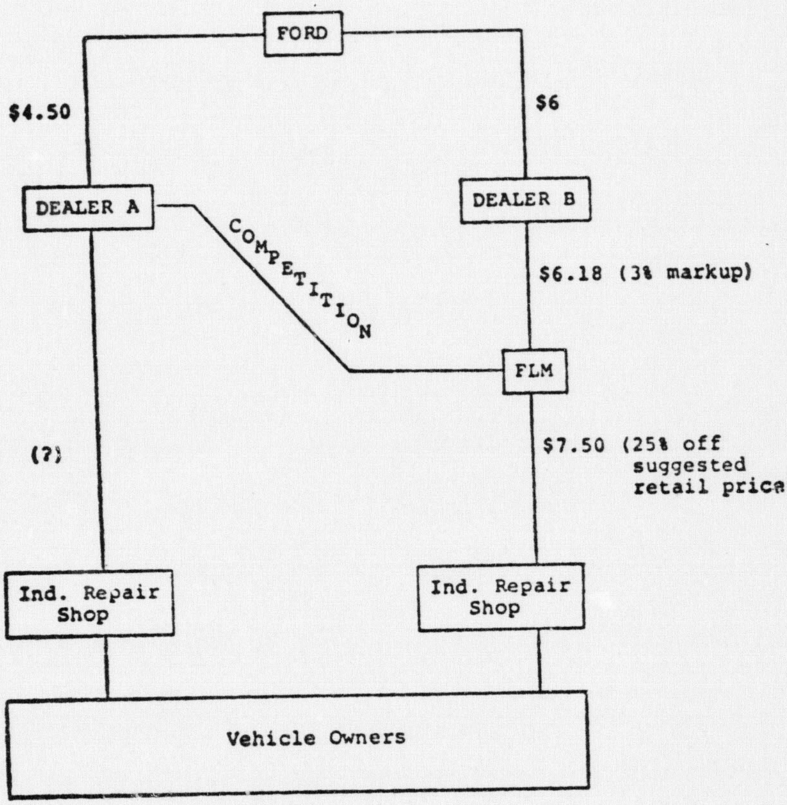
The absence of any price discrimination here is, as we have shown, dispositive of this appeal. It is thus unnecessary for this Court to reach the next issue under Section 2(a)—whether the price discrimination is likely to result in a substantial injury to competition. Nonetheless, the District Court's fundamental error on that question is manifest and can be illustrated by applying its "logic" to the traditional and unquestionably lawful functional discount granted a wholesaler vis-a-vis a direct buying retailer.

Logical application of Judge Griesa's analysis—which condemns every price discount resulting in injury to a competitor at any remote level of distribution—would render such discounts unlawful whenever the "favored" wholesaler elects to resell at a narrow profit margin, thus providing his retailer-customer a lower cost for the product than the price paid by the defendant's retailer-customer. By a parity of reasoning, the District Court's rationale would render Ford's entire incentive program unlawful whenever the dealer reselling to an independent repair shop chooses to take a narow margin so that the repair shop's cost is lower than the price Ford charges the dealer who competes with that shop in selling directly to the public. Yet Judge Griesa himself acknowledged that such discounts are *not* unlawful. (Slip Opinion, 1623a) Indeed, if they were, there would be no wholesalers in the marketplace.

In short, there is a glaring inconsistency between the conclusion impelled by the District Court's logic and the conclusion that is dictated by both law and common sense.

In essence, the District Court ruled that the differential between Ford's price when a dealer resells to independent repair shops and its price when a dealer does not do so is a discrimination and that it produces injury to competition between the "favored" dealer and FLM, a customer of the "disfavored" dealer. The scheme of distribution, as set forth by the District Court, may be shown diagramatically as follows:

Chart 1



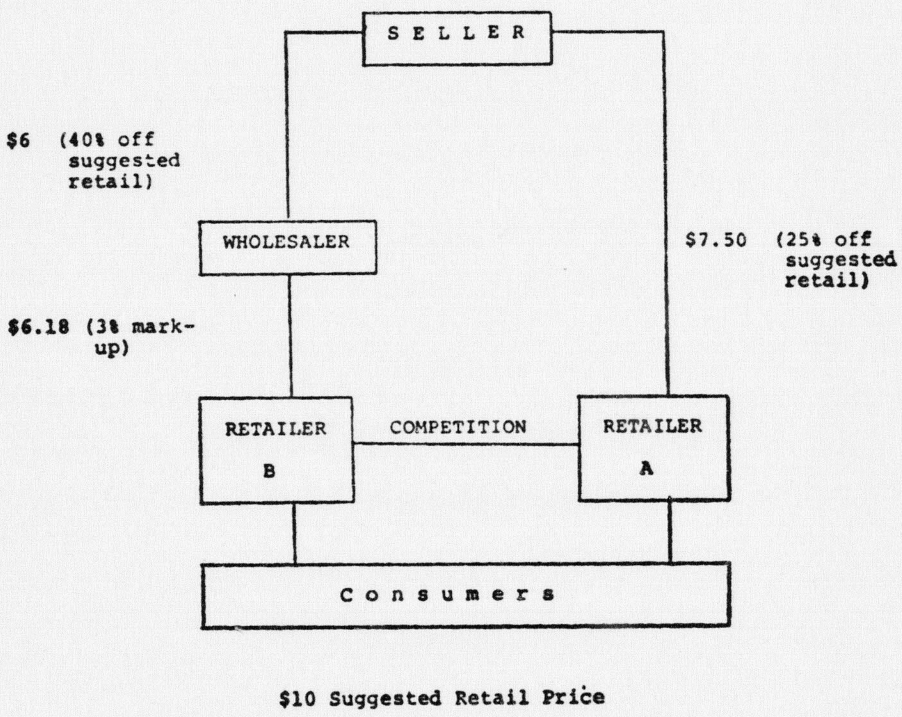
$10 (Suggested Retail Price)

Using a hypothetical crash part with a $10 suggested retail price (*see* Slip Opinion, 1586a-88a), the "favored" Dealer A receives a 25% allowance on parts he resells to independent repair shops and pays 25% off the $6 dealer net price (40% off $10 list) or $4.50. The "disfavored" Dealer B (FLM's supplier) receives no allowance and pays $6; taking a narrow 3% margin (*see id.*), Dealer B charges FLM $6.18. According to the District Court, the differential between Dealer A's $4.50 cost and FLM's $6.18 cost disadvantages FLM in its competition with Dealer A for the business of independent repair

shops;[22] and even though such injury to competition is not at the level where the "disfavored" purchaser (Dealer B) competes, the District Court found that Section 2(a) had been violated.

The fatal flaw in this analysis is readily apparent when it is applied to a hypothetical case involving the standard functional discount allowed to a wholesaler but not to a direct buying retailer:

Chart 2



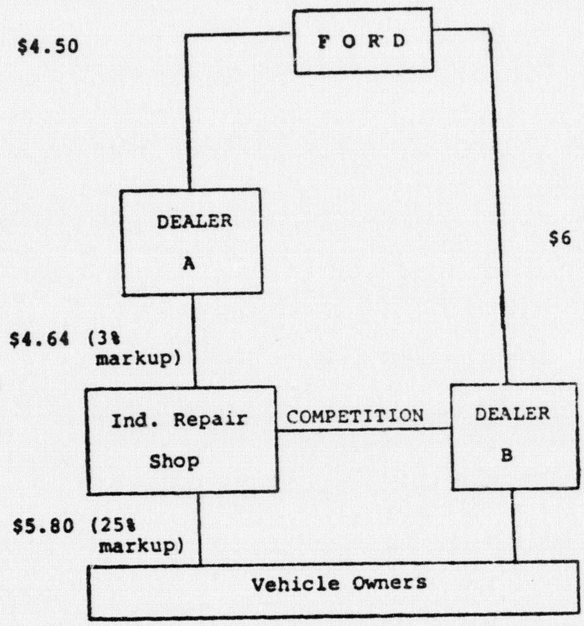
22. It is noteworthy that even if the "discrimination" found by the District Court were not present, and Dealer B's price were the same $4.50 paid by Dealer A, FLM would still be at a competitive disadvantage since *its* acquisition cost would have to be higher to allow its supplier a margin of profit. *Cf. Secatore's, Inc.* v. *Esso Standard Oil Co.*, 171 F. Supp. 665 (D. Mass. 1959); *Sano Petroleum Corp.* v. *American Oil Co.*, 187 F. Supp. 345 (E.D. N.Y. 1960) (If equality cannot help, discrimination cannot injure.)

In the situation portrayed in Chart 2, again using a hypothetical product with a $10 suggested retail price, the seller charges a retailer-customer (Retailer A) $7.50, or 25% off suggested retail. The seller also sells to a wholesaler who receives a functional discount of an additional 15% and pays $6, or 40% off suggested retail. The wholesaler (like FLM's suppliers) takes a narrow 3% margin and sells to Retailer B at $6.18. Retailer A (whose cost is $7.50) is at a competitive disadvantage vis-a-vis Retailer B (whose cost is $1.32 lower).

Needless to say, not even Judge Griesa would hold that the functional discount depicted in Chart 2 is unlawful. To the contrary, he flatly stated that "a standard functional discount, where a supplier charges different prices to purchasers at different functional levels of distribution, and where the *higher* price is charged to the purchaser at the level *farther* from the supplier in the chain of distribution—*i.e.*, the retailer is charged more than the wholesaler . . . is a standard business practice and has been sanctioned by the legal authorities." (Slip Opinion, 1623a, emphasis by the Court). Yet under the District Court's *reasoning*—which would condemn every price difference producing competitive injury at any remote level of distribution—such discounts should be unlawful.

The rule adopted by the Court below is even more bizarre: it would condemn under Section 2(a) the entire incentive allowance program which Ford instituted at the behest of the Federal Trade Commission. The point may be illustrated by another hypothetical case:

Chart 3



$10 Suggested Retail Price

Assuming again a part with a $10 suggested retail price, Chart 3 depicts Ford's basic distribution system. Dealer B pays $6 (40% off suggested retail) for a part he resells to a vehicle owner. Dealer A receives the 25% incentive allowance, pays $4.50 and resells it to an independent repair shop. If, like the dealers who in fact resold to FLM, Dealer A elects to take a narrow 3% margin, his price to the repair shop is $4.64. If the repair shop takes a margin even as high as 25%, his price to vehicle owners ($5.80) will be 20 cents lower than Dealer B's cost. The price differential

between dealers which Ford instituted at the FTC's behest could thus result in injury to competition between Dealer B and the independent repair shop. Depending on the independent pricing decision of the dealer reselling to the repair shop and the decision of the repair shop in setting its retail price (neither of which is under Ford's control), the incentive allowance program could (under the District Court's reasoning) violate Section 2(a)—a result which Judge Griesa himself would not reach and which plainly cannot be the law.

The District Court's error which produced this astonishing internal contradiction was its construction of the statute to prohibit any price difference (whether or not discriminatory) which results in competitive injury at any remote distributional level (whether or not the injured competitor is a "disfavored" purchaser from the allegedly discriminating seller). As we have shown above, the first error—on the "discrimination" issue—is dispositive so the second need not be reached. But the second—on the "competitive injury" issue—is equally egregious.

In sum, the District Court erred both in finding a price discrimination where none existed and in espousing a rule which would jeopardize all normal functional discounting.

B. The District Court Erred in Holding That FLM—a Non-Purchaser Indirectly Affected by the Alleged Discrimination—Had Standing to Sue

For the first time in a Robinson-Patman Act case, the District Court held that a plaintiff who has not purchased a product from the allegedly discriminating seller but rather from a purportedly disfavored customer has standing to assert a claim against the remote initial seller for treble damages under Section 2(a). That ruling not only

disregards the uniform course of judicial decision under the Robinson-Patman Act, but it flies in the face of the legion of authority in this Circuit which denies standing to persons indirectly and derivatively injured by an antitrust violation directly affecting someone else.

As the District Court itself noted, the only conceivable price discrimination here is between Ford dealers, since only such dealers purchase crash parts from Ford. To the extent that it was injured at all by reason of such "discrimination," FLM necessarily suffered its injury indirectly, derivatively and incidentally. But, as this Court has made clear time and again, Section 4 of the Clayton Act[23] does not permit the recovery of treble damages by a person who is not the direct victim of an antitrust violation.

1. The governing legal principles

Section 4 of the Clayton Act provides that treble damages may be recovered only by a person who is "injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." As this Court has frequently reiterated, the statutory requirement that the injury be "by reason of" an alleged violation of the antitrust laws restricts the right to sue to those persons whose injury flows *directly* from the alleged violation. Consequently, persons whose injury is "remote," "consequential" or "incidental," who sustained injury by reason of their relationship to an intermediate antitrust victim or who were not directly injured by the violation lack standing to sue and may not recover. The applicable principle was stated most recently in *Long Island Lighting Co.* v. *Standard Oil Co. of California*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3416 (January 20, 1976):

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23. 15 U.S.C. § 15.

"Under the rule, even parties whose injuries may be both immediate and foreseeable may lack standing to pursue a private remedy if that injury is indirect or incidental . . . ." 521 F.2d, at 1274.

This rule has been reaffirmed by this Court seven times in the last seven years.[24] It has been applied to dismiss actions by a variety of persons who, like FLM here, alleged they were injured as the result of antitrust violations directly affecting others.[25]

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[24] *Long Island Lighting Co.* v. *Standard Oil Co. of California*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3416 (1976); *Nassau County Ass'n of Ins. Agents, Inc.* v. *Aetna Life & Cas. Co.*, 497 F.2d 1151 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974); *GAF Corp.* v. *Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Fields Prods., Inc.* v. *United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *aff'g* 318 F. Supp. 87 (S.D.N.Y. 1969), *cert. denied*, 401 U.S. 949 (1971); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969). *See also, Raubal* v. *Engelhard Minerals & Chem. Corp.*, 364 F. Supp. 1352 (S.D.N.Y. 1973); *Kemp Pontiac-Cadillac, Inc.* v. *Hartford Auto. Dealers' Ass'n*, 380 F. Supp. 1382 (D. Conn. 1974).

[25] **Customers**: *Long Island Lighting Co.* v. *Standard Oil Co. of California*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 44 U.S. L.W. 3416 (1976); *Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 481 (S.D.N.Y. 1973); *United Egg Producers* v. *Bauer Int'l Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970). **Suppliers**: *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). **Stockholders**: *Bookout* v. *Schine Chain Theatres, Inc.*, 253 F.2d 292 (2d Cir. 1958). **Employees**: *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 113 F.2d 114 (2d Cir. 1940), *aff'g* 30 F. Supp. 389, 391 (S.D. N.Y. 1939). *See also, Hans Hansen Welding Co.* v. *American Ship Bldg. Co.*, 1973 CCH Trade Cas. ¶ 74,739 (S.D.N.Y. 1973); *Walder* v. *Paramount Publix Corp.*, 132 F. Supp. 912 (S.D.N.Y. 1955); *Bywater* v. *Matsushita Elec. Indus. Co.*, 1971 CCH Trade

(footnote continued on following page)

Thus, *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956), held that a patent licensor could not recover damages measured by his lost royalties resulting from an antitrust violation which injured his licensee:

> "Those harmed only incidentally by antitrust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed or who have been directly harmed may recover."[26] 224 F.2d, at 679.

Similarly, in *Billy Baxter, Inc.* v. *Coca Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971), standing was denied to a company which franchised bottlers to

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(footnote continued from preceding page)

Cas. ¶ 73,759 (S.D.N.Y. 1971); *Westmoreland Asbestos Co.* v. *Johns-Manville Corp., supra.* **Landlords**: *Westmoreland Asbestos Co.* v. *Johns-Manville Corp., supra; Lieberthal* v. *North Country Lanes, Inc.*, 221 F. Supp. 685, 690 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 269 (2d Cir. 1964). **Franchisors**: *Billy Baxter, Inc.* v. *Coca-Cola Co., supra.* **Licensors**: *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956). *See also, Western Geophysical Co.* v. *Bolt Associates, Inc.*, 1972 CCH Trade Cas. ¶ 73,872 (D. Conn.), *appeal dismissed*, 463 F.2d 101 (2d Cir.), *cert. denied*, 409 U.S. 1040 (1972).

26. The Court's reference to targets "aimed at" by the violation in *Trico* and other cases does not refer to any subjective intent to injure the plaintiff. *See, SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 189 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). The "target area" rubric is, in reality, a verbal variant of the applicable "direct injury" test. Moreover, there is no evidence that Ford changed the eligibility rules with respect to the incentive allowance in order to injure FLM. Indeed, the undisputed evidence shows that dealers continued to receive the incentive allowance on resales to FLM some 16 months after the policy clarification as to replacement parts generally (including crash parts) went into effect. (Stip. 25)

market its trademarked soft drinks and sold the necessary extracts to its franchisees. The franchisor alleged that its business was damaged as a result of a conspiracy between Coca-Cola and Canada Dry to deprive its franchisees of access to retail outlets. Despite the fact that Coca-Cola and Canada Dry knew their actions would inevitably deprive the plaintiff of business, the Court held that the supplier-franchisor's connection with the actual marketing of its trademarked beverages by others was not "sufficiently compelling to support a treble damage suit" by it (431 F.2d at 189). Looking to the essence of Section 4's requirement that injury be "by reason of" an antitrust violation, the Court ruled:

> ". . . this [causal] connection must also link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect. *While any antitrust violation disrupts the competitive economy to some extent and creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders, or consumers*, it has long been held that not all of these have the requisite standing to sue for treble damages. . . . *Consequently, a plaintiff must allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target area' of the defendant's illegal act."* 431 F.2d, at 187 (emphasis added).

Thereafter, in *Field Prods., Inc.* v. *United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *aff'g* 318 F. Supp. 87 (S.D.N.Y. 1969), *cert. denied*, 401 U.S. 949 (1971), this Court affirmed *per curiam* a decision denying standing to a producer of motion pictures which alleged that its income, derived from the defendant-distributor (to whom it supplied films), was

diminished as a result of the distributor's unlawful block-booking of sales to its customers.

The same principle was applied in *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cent. denied*, 406 U.S. 930 (1972), to deny standing to a landlord of theatres who alleged that the percentage rental payments it received were lower than they would have been in the absence of a conspiracy between its tenants and various exhibitors and distributors. Judge Mansfield explained the rule's rationale as follows:

> "The rationale behind the foregoing demarcation is simple, fair and reasonable. . . . It acknowledges that while many remotely situated persons may suffer damage in some degree as the result of an antitrust violation, their damage is usually much more speculative and difficult to prove than that of a competitor who is an immediate victim of the violation. Furthermore if the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery . . . would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress . . . ." 454 F.2d, at 1295.

As these and the other cited cases make plain, this Court has long recognized that any antitrust violation can produce far-reaching consequential injury. To avoid treble-damage "over-kill" and double recovery, the Court has determined that only directly injured persons may bring suit under Section 4 of the Clayton Act; conversely, it has ruled that those whose losses were caused by their relationship to another directly injured person may not recover. That is precisely the case here.

2. FLM's claimed injury is indirect, incidental and derivative.

It is virtually self-evident that in a non-primary line price discrimination case, the only directly-injured person is the disfavored purchaser since it is he who is victimized by the defendant-seller's discrimination in favor of the other purchaser. FLM—the customer of the directly affected "disfavored" dealer—has no more standing to sue than did the remote customers in *Long Island Lighting*, the licensor of the directly-affected licensee in *Trico*, the franchisor-supplier of the directly-affected franchisees in *Billy Baxter* or the lessor of the directly-affected lessees in *Fields* and *Calderone*. This conclusion is underscored by the unanimity of decisional law supporting the proposition that only direct purchasers from the defendant may sue for damages under Section 2(a) in non-primary-line cases.

Prior to the decision of the Court below, every court considering the issue had ruled that, in a non-primary-line case, only a direct purchaser has a cause of action. The leading authority is *Klein* v. *Lionel Corp.*, 237 F.2d 13, 14-15 (3d Cir. 1956), where Judge Biggs squarely held:

> "The decisions of many cases have crystallized the rule that an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimination."

See also, *Karlinsky* v. *New York Racing Ass'n*, 310 F. Supp. 937, 939 (S.D.N.Y. 1970) ("[P]laintiffs allege no facts which would indicate that they are discriminated against as purchasers. They, therefore, lack standing to sue under Robinson-Patman."); *United Banana Co.* v. *United Fruit Co.*, 245 F. Supp. 161, 168 (D. Conn. 1965), *aff'd on other grounds*, 362 F.2d 849 (2d Cir. 1966) ("In order for the

plaintiff's claim to have legal merit under the Clayton and Robinson-Patman Acts, . . . it must be proven that it is an actual purchaser from the defendants before discrimination can be charged."); *Merck & Co.* v. *Bronx Drug Co.*, 1963 CCH Trade Cas. ¶ 70,954 at p. 78,795 (S.D.N.Y. 1963) ("[D]efendant is not averred to be one of the 'purchasers' from plaintiff; defendant buys nothing from plaintiff. . . . Defendant therefore can have no cause of action under the Robinson-Patman Act."); *Thomas* v. *Amerada Hess Corp.*, 393 F. Supp. 58, 75 (M.D. Pa. 1975) ("[Plaintiff] can have no right of action under § 2(a) of the Clayton Act unless he is an actual purchaser from the company charged with the discrimination.").

Confronted with the overwhelming weight of authority denying standing to non-purchasers, the District Court sought refuge in the Supreme Court's decision in *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642 (1969). (Slip Opinion, 1610a-12a) But that decision lends no support to the District Court's grant of standing. For the plaintiff in *Perkins* was a *direct* purchaser from the alleged discriminator (Standard), and thus the issue of standing was not even before the Court.

Moreover, the District Court's attempt to divine from *Perkins* a holding *sub silentio* granting a non-purchaser standing to sue is equally unsupported by the decision. The District Court asserted that:

> "The decision makes it clear that Section 2(a) is to be construed as covering competitive injuries at levels of distribution beyond the level of the purchasers from the defendant." (Slip Opinion, 1611a)

The facts of *Perkins*, however, make clear that its holding is considerably more narrow than the reading given by the District Court. Perkins, the disfavored purchaser, was an integrated independent wholesaler-retailer of gasoline

products. Likewise Signal, the favored purchaser, controlled a gasoline jobber (Western Hyway) which in turn controlled a gasoline retailer (Regal). Signal transferred the gasoline to Western Hyway which in turn supplied Regal. Perkins claimed that it was injured in its competition at the retail level with Regal. The Court concluded that since Perkins unquestionably could have recovered had Signal sold its gasoline directly to Regal, there was:

> "no basis in the language or purpose of the Act for immunizing Standard's price discrimination simply because the product in question *passed through an additional formal exchange* before reaching the level of Perkins' actual competitor." 395 U.S., at 648 (emphasis added).

In short, *Perkins* stands for the proposition that a *direct* purchaser may assert a claim of competitive injury at a level two steps removed from the favored purchaser, *provided* he can demonstrate that the intervening levels involve merely "formal exchanges." It has no application to a situation where, as here, the party claiming competitive injury is *not* a purchaser from the alleged discriminator and the intervening levels between the "disfavored" claimant and the alleged discriminator are *separate* and *independent* entities.

An affirmance of the District Court's reading of *Perkins* would allow suits by customers of disfavored purchasers inevitably to enmesh the courts of this Circuit in the kinds of labyrinthine causation problems which this Court warned against in *Calderone* when it adopted "a reasonable and easily identifiable cut-off that avoids the unfortunate consequences of opening the flood-gate to all, no matter how remote their interest or incidental their relationship." (454 F.2d, at 1296) Since a remote purchaser's injury is invariably dependent upon the independent pricing decisions

of direct purchasers, the spectre of multiple recovery and complex proof of "pass-on" and the like provide clear examples of the wisdom of this Circuit's standing doctrine.

Surprisingly enough, only two years ago Judge Griesa himself articulated and applied the correct rule in *Nat'l Auto Brokers Corp.* v. *General Motors Corp.*, 376 F. Supp. 620 (S.D.N.Y. 1974):

> "As the statute itself indicates, in order to maintain a cause of action under Section 2(a) of the Robinson-Patman Act, the plaintiff must be a purchaser from the person charged with the discrimination. *Klein* v. *Lionel Corp.*, 237 F.2d 13,14-15 (3d Cir. 1956)." 376 F. Supp., at 626.

The Court below was right the first time it addressed the standing issue. Its original statement was correct as a matter of Robinson-Patman law; and it was also correct as a matter of general standing principles in this Circuit. FLM, which was neither a direct nor an indirect purchaser from Ford was injured, if at all, incidentally and derivatively. It thus has no standing to sue, and the judgment in its favor should be reversed.

In sum, the District Court's finding of liability should be reversed for two separate and independently dispositive reasons: First, Ford did not discriminate in price between its purchasers of crash parts, so that the Robinson-Patman Act is inapplicable. Second, FLM, which was not a purchaser and whose injury, if any, was indirect, derivative and incidental, lacks standing to sue.

Since the judgment below must be reversed on these grounds, this Court need not reach the District Court's award of damages. But even there, the Court below committed reversible error by disregarding the controlling precedent in this Circuit.

II.

The District Court's Award of Automatic Damages Disregarded Controlling Precedent in this Circuit; and its Further Award Based on Lost Sales Was Not Supported By the Evidence.

The District Court awarded FLM $246,766 (untrebled) in damages measured by the amount of incentive allowances Ford dealers reselling to FLM would have received absent the alleged discrimination. Such "automatic" damages are not recoverable in this Circuit. *Enterprise, Indus., Inc.* v. *Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). In addition, the Court awarded additional damages of $44,736 (untrebled) for lost profits on sales allegedly lost by FLM resulting from the denial of the allowance to FLM's suppliers despite the lack of any evidence of actual lost sales. Neither award can stand.

A. The District Court's Award of $246,766 in Automatic Damages Based on the Quantum Of Allowance Denied to FLM's Suppliers Plainly Contravened This Circuit's *Enterprise* Doctrine

It has been settled law in this Circuit for almost two decades that in a private action under the Robinson-Patman Act, a disfavored plaintiff is not automatically entitled to recover as "damages" the amount of the price differential on which the discrimination is premised. Under Judge Learned Hand's decision in *Enterprise, Indus., Inc.* v. *Texas Co., supra*, such "automatic damages" are not recoverable; the plaintiff must show that, as a proximate consequence of the price discrimination, he either lost sales (by diversion resulting from the favored competitor's lower resale price)

or he lost profits (by lowering his resale price to match his competitor's price).

Enterprise was an action by a gasoline service station against Texaco. During several price wars, defendant had granted allowances to those stations involved in the wars but not to plaintiff. Plaintiff sought damages in the amount of the discrimination, and the District Court permitted recovery on that automatic basis. 136 F. Supp. 420 (D. Conn. 1955).

On appeal, this Court held that "the discrimination was not a proper measure of the loss" (240 F.2d at 459), and that it was therefore error to assess "the damages by accepting as the measure of plaintiff's loss the difference between the sale price charged the plaintiff and the lowest price charged any of [the favored purchasers]." (*Id.*)

Enterprise's rejection of automatic damages[27] is predicated squarely upon Section 4 of the Clayton Act, which requires that damages be incurred "by reason of" the antitrust violation, *i.e.*, the price discrimination. Since the Robinson-Patman Act prohibits certain discriminatory price *differences*, a disfavored purchaser's damages must accordingly be the proximate result of such a *difference*.

27. The *Enterprise* rule has been followed by numerous courts within and outside this Circuit. *E.g., Lombino & Sons, Inc.* v. *Standard Fruit & Steamship Co.*, 1975-2 CCH Trade Cas. ¶ 60,527, p. 67, 329 (S.D.N.Y. 1975); *Kreiger* v. *Texaco Inc.*, 373 F. Supp. 108, 112 (W.D.N.Y. 1973); *McCaskill* v. *Texaco Inc.*, 351 F. Supp. 1332, 1341 (S.D. Ala. 1972), *aff'd per curiam*, 486 F.2d 1400 (5th Cir. 1973); *Kidd* v. *Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896 (7th Cir. 1966); *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38, 60 (8th Cir. 1951). The only Circuit adopting a contrary view is the Ninth. *Fowler Mfg. Co* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).

The violation consists, not of any *overcharge* to the disfavored purchaser, but rather of an *undercharge* to his favored competitor (*i.e.*, the discrimination). If both purchasers paid the same high price, there would be no discrimination and hence no violation. It is therefore the undercharge to the favored buyer which must be the proximate cause of injury in order for a plaintiff to recover damages under Section 4.

The point was made clearly by Justice Cardozo in the context of an Interstate Commerce Commission rate discrimination proceeding in *ICC* v. *United States*, 289 U.S. 385, 390 (1933):

> "The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less."

Thus, unless the favored purchaser takes advantage of his lower cost by reducing his selling price, the disfavored purchaser cannot possibly be injured by the fact that his competitor received a lower price (*i.e.*, by the discrimination).[28]

The District Court here, by awarding FLM "automatic" damages, treated the alleged discrimination as an "overcharge." But, Justice Cardozo held, "overcharge and discrimination have very different consequences and must be kept distinct in thought." (289 U.S. at 390, followed in *Enterprise*, 240 F.2d at 460)

Applying this principle here, if Ford had not granted an incentive allowance to any dealer but instead had charged

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28. As appears more fully at pp. 43-48, *infra*, FLM attempted to establish such losses but failed to do so.

all dealers the price it charged FLM's suppliers, there would have been no discrimination. FLM's alleged damage must therefore arise not because its suppliers paid *more*, but because other purchasers (*i.e.*, "favored" dealers) paid *less* and reflected this fact by lowering their prices. This is the essential teaching of *Enterprise*.

Only through a showing of lower prices offered by "favored" purchasers is the damages issue even reached. Once such a showing is made, *Enterprise* sets forth the types of damages which properly may be recovered in a non-primary-line price discrimination case:

> " 'If by reason of the discrimination, the preferred [purchasers] have been able to *divert business* that would otherwise have gone to the disfavored [purchasers], damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the [disfavored purchaser] *to sell at a lowered . . . price . . .*, damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more.' " 240 F.2d at 459-60, quoting from 289 U.S. at 390-91 (emphasis added).

This, of course, is but another way of saying that damages must result from undercharges to favored competing buyers. The undercharge may enable the favored buyer to sell at a lower resale price than plaintiff and thereby to divert sales from plaintiff. On the other hand, to avoid such diversion which would otherwise result from the undercharge, the disfavored buyer may be forced to lower his price, thereby reducing his profits. In either event, damages are caused by the undercharge (*i.e.*, the discrimination), and not by the fact that plaintiff paid a higher price.

The District Court disregarded these controlling principles and awarded FLM "automatic" damages untrebled of $246,766. This was plain error.[29]

Moreover, even if automatic damages were permissible as a matter of law where the plaintiff is the disfavored purchaser, there certainly was no justification for *extending* the principle to cover FLM, which was not a direct purchaser from Ford, whose price depended on the independent pricing decision of its supplier, and which cannot be permitted to assume without proof that its supplier would have passed on to it the full amount of any incentive allowance which that supplier would have received. This component of the damage judgment must accordingly be reversed.

B. Insofar as FLM Did Endeavor to Satisfy the *Enterprise* Test And Prove Diversion of Sales, the Evidence Was Wholly Speculative and Insufficient to Sustain the District Court's $44,736 Award

In awarding $44,736 for purported "lost sales," the District Court again ignored the requirements of proof set forth by this Court in *Enterprise*. Instead of requiring FLM to make a reasonable showing of the amount of sales it lost to its dealer-competitors because they received the incentive allowance and FLM's suppliers did not, the District Court *assumed* that *any* decline in FLM's sales volume since 1973 must have been attributable to the loss of the incentive

29. The District Court stated that Ford conceded FLM's right to recover the amount of the allowances denied FLM's suppliers on resales to FLM. However, an examination of the pages of Ford's Post-Trial Brief on which the Court relied (pp. 1545a-49a) reveals that Ford made no such concession. It merely proceeded on the premise—correct in light of *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 153 (2d Cir. 1949)—that the amount of the discrimination was the *ceiling* on any possible recovery.

allowance, and made its award on that assumption. (Supp. Opinion, 2027a-29a) Such an assumption is neither sanctioned by this Court nor warranted by the evidence.

In *Enterprise*, Judge Hand defined the proper method by which lost sales allegedly resulting from a price discrimination may be established. The Court held that the plaintiff could recover its profits from proven lost sales caused by the price discrimination, but went on to describe in no uncertain terms the nature of the required proof:

> "The gross loss was the profit on any sales that it would have made to the nine competitors' customers whom it could and would, have retained, had it been able to buy from the defendant at the same price as the competitors." 240 F.2d, at 458.

It thus is apparent that under *Enterprise*, a plaintiff must show *both* (a) that it lost customers to competitors by reason of a price discrimination because they were able to sell at lower prices to reflect their lower costs; and (b) the amount of the profit it would have made from sales to "customers whom it could and would, have retained."

Here, the evidence is utterly insufficient to satisfy either of these two requirements. With respect to requirement (a), there is some evidence indicating that three franchised dealers,[30] purported competitors of FLM, had resold crash parts at discounts below the customary 25% discount off

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[30] The franchised dealers identified by the Court were: Empire Ford Sales, Inc. in Mt. Vernon, Ruckle Ford in Yonkers and W. H. Jackson Ford Sales in Ossining. (Supp. Opinion, 2028a) Empire Ford became insolvent in late 1975, and the dealer-principal subsequently was replaced in March 1976. (Letter from Robert MacCrate, Esq., to Stuart A. Schlesinger, Esq., March 26, 1976, 2157a-59a)

the suggested retail price granted by FLM and other franchised dealers to their repair shop customers. (Supp. Opinion, 2028a) FLM's principal, Stephen McKee, testified, however, that he had no idea of the volume of sales lost since "I haven't taken time to actually study how many customers I have lost to these suppliers." (1953a) Instead, he supplied only the conclusory assertion: "I have lost some." (*Id.*)

As to requirement (b), since plaintiff was unable to identify any customers it lost, plaintiff could not—and did not—show that it would have retained any of these unknown customers or show the profits it would have made on their "lost sales."

The inadequate evidence on this claim for damages is similar to that which confronted this Court in *Enterprise*, and Judge Hand's observation is equally apt here:

> "[W]e have no reliable figures from which to appraise either the gross loss or the gain, for the plaintiff has not shown how much of the business of the nine Texaco competitors it would have retained or obtained at the same price as they." 240 F.2d, at 458-9.

For these reasons alone, the District Court's award of damages for "lost sales" should be vacated in its entirety.

What is more, the method of computing these "lost sales" employed by plaintiff, and accepted by the District Court, is wholly speculative and unsupported by the evidence. The manner in which plaintiff attempted to calculate its "lost sales" defies easy explanation. Essentially it entailed three separate steps and several erroneous underlying assumptions.

Plaintiff's first step was to compare the dollar volume of its sales in fiscal years 1974 and 1975 with the level of its 1973 sales. (PX 1003, 147e) This comparison was premised on the assumption that any decline in sales volume during fiscal 1974 and 1975 from 1973 levels must have been attributable to the inability of FLM's suppliers to receive the incentive allowance. (Supp. Opinion, 2029a) The undisputed evidence, however, demonstrates this to be an erroneous assumption.

Mr. McKee, FLM's principal, testified that the volume of FLM's sales had *absolutely nothing* to do with receipt of the incentive allowance by its suppliers (1961a), but rather was dependent upon the number and severity of crashes. (*Id.*) Moreover, it is uncontroverted that extrinsic economic factors played a key part in the decline of crash part sales in 1974. M. J. Rowlands, General Sales Manager—Ford Parts Division, testified at the trial that during the first six months of 1974, Ford's nationwide sales of crash parts had declined by approximately 7%. (763a) One cause of this decline was the widespread gasoline shortage existent during the period which resulted in lessened automobile traffic and fewer collisions. (914a-15a)

In the face of this evidence, the assumption that FLM's sales volume would have remained at the same level as 1973 had its suppliers been receiving the incentive allowance is wholly speculative even if it could properly be assumed—which it cannot—that FLM would have received the benefit of the full amount of any such allowance granted its supplier.

Plaintiff's second step, having computed the decline in sales from 1973, was to calculate the amount of *gross* profit it would have enjoyed on these "lost sales." Plaintiff

assumed that it would have maintained a gross profit margin of 33.5 percent (PX 1004, 148e), which was the gross profit on sales in fiscal 1972—the last full year before the incentive allowance policy was clarified to exclude resales to wholesalers. The validity of this assumption is belied by the testimony of Mr. McKee, which was adopted by the District Court, that as early as 1973 the three franchised dealers noted above had begun selling crash parts at low profit margins (even as low as cost on some items) (1951a-53a; PX 1006, 151e; Supp. Opinion, 2028a) and that had FLM been receiving the benefits of the incentive allowance, it would have been able to meet this price competition. (1943a; Supp. Opinion, p. 7) Had FLM met this competition, even assuming it were receiving the benefits of the incentive allowance, its gross profit margin would have been greatly reduced (perhaps to zero on those items which other dealers were selling at cost) and the failure of plaintiff or the Court to take this into account invalidates the entire basis upon which the profit calculations were made.

The third and final step in plaintiff's calculations entailed reducing its gross profit figure to net. To do this, plaintiff's lawyer-accountant-expert witness, David L. Wasser, engaged in a convoluted procedure which included deducting from the *1972* gross profit percentage those expenses incurred in *1974* which he characterized as "flexible expenses" (PX 1004, 148e), that is, those expenses which would vary with the volume of sales and which would have been incurred had plaintiff's supplier been receiving the incentive allowance. Even assuming such mismatching of 1972 profits with 1974 expenses has some validity, Mr. Wasser failed to take into account several additional expenses which Mr. McKee testified FLM would have in-

curred had it been receiving the incentive allowance. These included the hiring of additional employees and the purchase and maintenance of additional delivery trucks. (1964a) Since these expenses undoubtedly would vary with the volume of sales and, according to Mr. McKee, would have been incurred had FLM been receiving the incentive allowance, they should have been reflected by plaintiff in a reduced net profit projection.

In view of the critical defects which underlie and flaw each step of plaintiff's purported "lost sales" calculations, the District Court's award of damages based on these calculations cannot stand and therefore should be vacated. *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962).

CONCLUSION

The District Court committed two fundamental errors of law, each of which is independently dispositive of this appeal, in ruling: (1) that Ford's non-discriminatory incentive allowance system violated Section 2(a) of the Robinson-Patman Act; and (2) that FLM, a non-purchaser indirectly affected by the incentive allowance, had standing to sue. In any event, the District Court's award of damages cannot be squared with the controlling law of this Circuit.

For these reasons, the District Court's judgment should be reversed.

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Respectfully submitted,

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